

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA  
RENO, NEVADA

WES JOSEPH PERTGEN	)	3:04-cv-00352-LRH-RAM
	)	
Petitioner,	)	<u>ORDER</u>
	)	
vs.	)	
	)	
E. K. MCDANIEL, et al.,	)	
	)	
Respondents	)	
_____	)	

On August 17, 2006, the court entered an Order dismissing the habeas corpus petition in this case (docket #49). Judgment was entered on the same day (docket #50).

On September 8, 2006, petitioner filed a Notice of Appeal (docket #51). He then filed a Motion for Certificate of Appealability (docket #53). Respondents have filed an opposition to the application for a certificate of appealability (docket #55).

Petitioner was permitted leave to proceed *in forma pauperis* in pursuit of this petition and, thus, shall be permitted to pursue his appeal without paying the filing fee.

The court will deny petitioner's application for a certificate of appealability. The standard for the issuance of a certificate of appealability calls for a "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c). The Supreme Court has interpreted 28 U.S.C. §2253(c) as follows:

Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy §2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or

1 wrong. The issue becomes somewhat more complicated where, as  
2 here, the district court dismisses the petition based on procedural  
3 grounds. We hold as follows: When the district court denies a habeas  
4 petition on procedural grounds without reaching the prisoner's  
5 underlying constitutional claim, a COA should issue when the prisoner  
shows, at least, that jurists of reason would find it debatable whether  
the petition states a valid claim of the denial of a constitutional right  
and that jurists of reason would find it debatable whether the district  
court was correct in its procedural ruling.

6 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also James v. Giles*, 221 F.3d 1074, 1077-79  
7 (9th Cir. 2000). The court finds that petitioner has not met this standard.

8 Petitioner argues that he is entitled to two years time to file his federal petition after  
9 resentencing because the grounds for relief he wished to raise were not properly raised in direct  
10 appeal and, thus, his post-conviction petition should be considered a direct appeal and he should be  
11 granted another year after this "direct appeal" was denied. The argument is wholly without merit.

12 The court finds that jurists of reason would not find debatable the question whether  
13 petitioner's habeas corpus petition was filed within the time allowed by the one-year statute of  
14 limitations imposed by the Antiterrorism and Effective Death Penalty Act (AEDPA).

15 The court also finds the petitioner's other arguments to support a certificate of  
16 appealability fail to meet the standard set forth above. Specifically, petitioner blames his court  
17 appointed counsel for his lack of success in this forum. There is no guarantee of counsel on  
18 collateral review of a criminal conviction. *Evitts v. Lucey*, 469 U.S. 387 (1985). Since petitioner is  
19 not entitled to the assistance of counsel in this matter, his arguments are not persuasive.

20 **IT IS THEREFORE ORDERED** that petitioner's application for issuance of a  
21 certificate of appealability (docket #53) is **DENIED**.

22 Dated this 17<sup>th</sup> day of October, 2006.



23  
24  
25 LARRY R. HICKS  
26 UNITED STATES DISTRICT JUDGE